

(1996) 12 DEL CK 0009
In the Delhi High Court
Case No : First Appeal No. 306 of 1995

Lotus International

APPELLANT

Vs

Chaturbhujadas Karnani Textiles (P) Ltd.

RESPONDENT

Date of Decision : 16-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 7

Citation : (1997) 1 AD 446 : (1997) 2 CLT 256 : (1997) 65 DLT 300 : (1997) 40 DRJ 385

Hon'ble Judges : M. Jagannadha Rao, C.J.; Manmohan Sarin, J

Bench : Division Bench

Advocate : K.S. Bindra, Sunil Magan and Rajesh Benati, for the Appellant;

Judgement

M. Jagannadha Rao, C.J.

(1) ADMIT.

(2) The defendants 1 to 3 are the appellants in this appeal and the plaintiff company is the respondent. This Fao has been filed against the order dated 23.8.1995 passed in I.A. 8411 of 1995 (wrongly shown as is 8495/95 in the impugned order) in Suit No.2575 of 1987 by which the learned Single Judge refused to grant permission to the appellants to cross-examine the witnesses of the plaintiff and also for adducing evidence on the appellants' side in view of the fact that the appellants had been set ex-parte on 6.7.1994. The point that arises in the appeal is whether in a case where the defendants are set ex-parte after having filed their written statement, the defendants could be permitted to cross-examine the witnesses of the plaintiff and also adduce evidence on their side.

(3) The respondent company filed the suit for recovery of Rs. 11,67,397.79 against the appellants on account of alleged supply of goods during July to September, 1986. The 1st appellant filed a written statement denying the supply of goods by the respondent to the appellants and raised other contentions. The other appellants adopted the written statement of the 1st appellant. It is not

necessary to set out the various contentions raised by the appellants in the written statement.

(4) Initially an Advocate by name, Mr. Gulshan Rai was appearing for the appellants and he died in May,1993 and thereafter another Advocate Mr. R.K.Gupta was engaged and he put in his appearance and sought time to file an amended written statement. The suit was adjourned and fixed for framing of issues on 6.7.1994. On that date, appellants' counsel, Mr. R.K.Gupta informed the Court that he had no instructions in the matter, that he may be discharged and the appellants may be proceeded ex-parte. Therefore, the appellants were set ex-parte on 6.7.1994.

(5) An application, I.A. 394/95 was moved on behalf of the appellants under Order 9, Rule 7 on 13.1.1995 which came up for hearing on 16.1.1995, 17.1.1995 and 25.1.1995. On 17.1.1995 the learned Single Judge while adjourning the case to 25.1.1995 recorded that the respondent-plaintiff's counsel had stated that he had asked for a few documents from his client (plaintiff), who was in Bombay, and those documents were required to enable a just decision in I.A.394/95. The hearing was adjourned to 25.1.1995 to enable the plaintiff to file the said documents. Thereafter, the plaintiff filed photo copies of some documents, which according to the appellants were false. On 25.1.1995 the learned Judge passed an order that the appellants must be deemed to have admitted the receipt of Rs. 3,34,000 and, therefore, passed an order allowing I.A. 394/95 subject to the condition that the appellants deposited 50% of the suit amount on or before the next date of hearing. That required the appellants to deposit around Rs. 6 lakhs. Appellants filed FAO(OS) No.81/95 against the said order and in that appeal a Division Bench of this Court passed an order on 24.3.1995 directing the appellants to deposit Rs. 2 lakhs instead of Rs. 6 lakhs within 3 weeks. Appellants moved an application for extension of time. (In the meantime, the trial Court passed an order on 30.3.1995 framing issues in the suit). On 10.5.1995 the application for extension of time was dismissed by the Division Bench inasmuch as the amount of Rs. 2 lakhs was not paid within time. The Bench also stated that the learned Single Judge was free to proceed with the suit. On 20.7.1995 FAO(OS) No. 81/95 was itself dismissed.

(6) The suit came up on 25.7.1995 and was adjourned to 1.8.1995 on the representation that a SLP had been filed by the appellants against the order dismissing FAO(OS) No. 81/95. Thereafter, the suit was being adjourned from time to time on 2.8.1995, 16.8.1995 and finally to 23.8.1995. It was at that stage that on 21.8.95 the appellants moved a fresh application, I.A. 8411/95 under Order 9, Rule 7 read with Section 151 CPC praying that they may be allowed to join the proceedings from that point onwards and defend the suit by adducing evidence on their side and also by rebutting, controverting or cross-examining the witnesses and the documents filed of the plaintiff. The said application came up before the learned Single Judge on 23.8.1995 and was dismissed on the ground that the is 394/95 filed under Order 9 Rule 7 was

conditionally allowed and the conditions not having been complied, that is was dismissed. The suit was also decreed.

(7) Aggrieved by the order passed in I.A.8411/95 refusing to permit the appellants from cross-examining the plaintiff's witnesses and also refusing permission for adducing evidence on the side of the appellants, this appeal has been filed.

(8) Learned counsel for the appellants has contended before us that whenever a defendant is set ex-parte, he has a right to join in the proceedings and participate in the same from the stage at which he was set ex- parte. It may be that the stage at which a defendant might have been set ex-parte might be different in different suits. But inasmuch as in the present case, the appellants had filed a written statement, they were set ex-parte on 6.7.1994 and much later on 13.3.1995 issues were framed, it is contended that it was open to the appellants to claim a right to cross-examine the witnesses of the plaintiff and also adduce evidence on their side.

(9) We shall mention a few more details of the events which took place after 6.7.1994. On 26.9.1994 the learned Single Judge passed an order in the suit directing ex-parte evidence to be filed by the plaintiff by way of affidavits within 6 weeks. For exhibiting the documents the matter was to be listed before the Joint Registrar on 15.12.1994. On 13.1.1995 affidavits by way of evidence had been filed on behalf of the plaintiff. Documents as mentioned in the affidavits were exhibited and marked as D-2 to D-11. Learned Judge directed the suit to be listed on 16.1.1995 as a short matter. On 16.1.1995 the matter was adjourned to 17.1.1995. On 17.1.1995 in I.A.394/95 which was filed on 13.1.95 the learned Single Judge passed an order that the plaintiff wanted to get some documents from Bombay and file the same for the purpose of a just decision of the I.A. On 25.1.1995 the I.A. was allowed subject to payment of 50% as already stated. On 30.3.95, the learned Single Judge stated "that the suit is otherwise at the stage of framing of issues", and on that basis framed 7 issues. The Court also stated that further documents within the meaning of Chapter 8, Rule 5 of High Court (Original Side) Rules and list of witnesses be filed by the parties within six weeks. The matter was listed on a short matter on 25.7.1995. On that date it was again adjourned to 1.8.1995 and 2.8.1995, 16.8.1995 and then to 23.8.1995 on which date the I.A.8411/95 (and not is 8495/95 as stated in the impugned order) which was filed on 21.8.1995 under Order 9, Rule 7 and Section 151 CPC was dismissed, refusing permission to adduce evidence on the side of the appellants and also refusing to grant permission to the appellants to cross-examine the witnesses of the respondent/plaintiff. The suit was decreed as prayed for.

(10) The point for consideration is: Whether in a suit where the defendant has filed written statement and has been then set ex parte under Order 9 Rule 6 CPC & and his application under Order 9 Rule 7 has been dismissed, the defendant can join proceedings and not merely seek to cross examine the

plaintiff's witnesses in the interrogatories but also seek to adduce evidence on his side?

(11) The leading case in this behalf is the decision of the Supreme Court in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, . That decision itself answers the point before us, if the facts therein are analysed carefully. In that case too, the appellant (who was respondent in the election petition filed by one Bhurelal) had filed his written statement. Issues were also framed and thereafter he was set ex parte on 17.3.1953 at 1.15 p.m. Later, on the same day, the petitioner, Mr. Bhurelal and two witnesses were examined, then on 18th five more witnesses were examined and the case was adjourned to 20th. On 20th, the appellants' advocate appeared but was not allowed to participate in the proceedings as the appellant had been set ex parte on 17.3.1953. On 20th, three more witnesses were examined. On 21st, application was made to set aside the "ex parte" proceedings dated 17.3.53 and asking leave to cross-examine Bhurelal's witnesses whose evidence had already been recorded. The application was rejected on 17.7.53. The Tribunal felt that since the appellant was set ex parte on 17.3.53, it had no power to allow the appellant to join and take part in the proceedings in as much as the appellant had not shown good cause for his absence on 17.3.53 and for setting aside that order.

(12) The Supreme Court considered two aspects of the matter: (i) Where good reason is shown for absence of defendant: In case good reason is shown for the defendant's absence on the day he was set ex parte, he would be relegated to the position as if he was not set ex parte, under Order 9 Rule 6. Here the Supreme Court pointed out that Order 9 Rule 6 merely permits the trial Court to "proceed ex parte" i.e. in the absence and there is indeed no question of passing an order similar to an ex parte decree or ex parte order. Order 9 Rule 6 merely gives permission to the Court to proceed forward in the absence of the defendant. No order setting defendant ex parte is, in fact, contemplated by Order 9 Rule 6 though it may be recorded in the minutes that the defendant is absent and the Court is proceeding forward under Order 9 Rule 6 in his absence. In case, the defendant files an application to set aside the proceedings setting him ex parte and good cause is shown, he is, as stated above, relegated to the status quo ante as it stood before he was set ex parte. (ii) Where good reason is not shown for absence of defendant : But, in case the Court finds no good reason for defendant's absence and for setting aside the order setting him ex parte, that would not be the end of the matter. The Supreme Court stated that as and when the defendant joins and wants to partake in the proceedings, the Court has power to allow him to do so and has to exercise discretion in regard to allowing him to participate in the proceedings. The Supreme Court pointed out (para 40) that in the case before them the Tribunal had failed to exercise discretion to permit the defendant joining in the proceedings because "it considered that it had none and thought that until the "ex parte" order is set aside, the defendant could not appear either personally or through counsel". Even if no good cause was shown to set aside the order setting defendant ex parte on 17.3.53, the

defendant "had a right to appear through counsel on 20.3.53 and take part in the proceedings from the stage on which they had been reached, subject to such terms and conditions as the Tribunal might think fit to impose." On facts in the Supreme Court case, it would be seen that several witnesses were examined for the plaintiff after the appellant was set ex parte on 17.3.53 and before the appellant's counsel sought permission to participate in the proceedings. On 20th, the appellant's counsel intervened and was refused permission and three witnesses were thereafter examined. The Supreme Court stated Para 40): "Whether he should have been allowed to cross-examine the three witnesses who were examined after the appearance of his counsel, or whether he should have been allowed to adduce evidence, is a matter on which we express no opinion, for that has to depend on whatever view the Tribunal in a sound exercise of judicial discretion will choose to take of the circumstances of this particular case..... ". The Court said finally, that in any event, it could "find no justification for not at least allowing counsel to argue." The question whether (see p. 434 vol. 1) appellant "should have been allowed to cross-examine the three witnesses or been allowed to adduce evidence" on his side was a matter of discretion and not one of power. Again towards the end of the judgment, they said (see para 42), "the Tribunal will also consider and determine whether it will be proper in the circumstances of the case to allow the appellant to adduce his own evidence".

(13) Thus, it is clear that even if application filed under Order 9 Rule 7 is not allowed, the Court has power to permit the defendant to join and participate in the suit and cross-examine the plaintiff's witnesses provided such cross-examination had not already been foreclosed (See reference here only to the three witnesses proposed on 20.3.53 in the Supreme Court case). The Court has also power to permit the defendant to adduce evidence on his side. The whole thing, Therefore, depends upon at what stage the defendant has been set ex parte under Order 9 Rule 6 CPC and at what stage he had chosen permission to participate in the proceedings, even if he had not shown good cause for restoration of status quo order.

(14) We shall refer to a few more decided cases which deal with the question.

(15) In Arjun Singh Vs. Mohindra Kumar and Others, the respondent in the case filed written statement and issues were settled on 28.2.1958 and was set ex parte on 27.5.58. The application to set aside the same was dismissed. (We are not here concerned with the relevance of certain other proceedings in that case). The Court held (see para 17) that in Order 9 Rule 7, the words used are "where the Court has adjourned the hearing of the suit ex parte", and that would mean that "there is to be a hearing on the date to which the suit stands adjourned. If the entirety of "hearing" of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under Order 20 Rule 1, there is clearly no adjournment of the hearing" of the suit, for there is nothing more to be heard in the suit". On the facts of the case, the Supreme Court held that the case was

adjourned with the words "judgment reserved" before the defendant came forward and Therefore, the defendant could participate only in receiving the judgment. It is clear Therefore that before the appellant there joined in the proceedings, the judgment was "reserved" and there was no scope for any worthwhile participation by the defendant.

(16) The decision of the Supreme Court in *madule India vs. Kamakhya Singh Deo* (1988) (2) RCR 530) cited before us is not in point. It deals with the question as to what is the position if written statement is not filed. It says, it is not mandatory for the Court to pass a decree in favor of the plaintiff straightaway for non-filing of written statement. The Court has to exercise discretion whether further proceedings could take place, and this is the position notwithstanding the use of the word "shall" in Order 8 Rule 10. That case is, Therefore, not relevant here.

(17) In *Gokarakonda Venkatasubbiah Vs. Daliparthi Lakshminarasimham*, approved by the Supreme Court in *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, , decided by Wallace J. the written statement was filed and on 27.9.23, defendant was set ex parte. plaintiff adduced evidence on that day and the hearing was adjourned to 13.10.23. On 13.10.23 defendant applied to have the order dated 27.9.23 set aside. That request was rejected. It was held that the request of the defendant to cross-examine the plaintiff's witnesses and to adduce evidence on his side (p. 1274 vol. 2) could still not be denied.

(18) In *Perumal Naicken Vs. Kondama Naicken and Another*, Varadachariar J. (as he then was) dealt with the question whether a defendant who has been set ex parte could, if circumstances permitted, be permitted by the Court to adduce evidence on his side. It held, the Court had power to do so. On facts, it was noticed that the defendant was set ex parte on 10.1.36, he applied on 30.7.36, for setting aside the same and the application was dismissed on 15.8.36. On 18.8.36, defendant applied for filing written statement and to take part in the proceedings. On 18..8.36 the trial court refused permission. The High Court allowed Crp 1561/36 against the order dated 18.8.36 and having done so, it held, following the view of Wallace J. in *Gokarakonda Venkatasubbiah Vs. Daliparthi Lakshminarasimham*, that the defendant could not only cross examine the plaintiffs witnesses (who were yet to be examined) but also adduce evidence on his side. It was noticed on facts that "no evidence has yet been recorded".

(19) In *Kumara Pillai Vs. Thomas*, , the 2nd defendant was set ex parte on the first date of hearing. The 1st defendant had filed the written statement. The 2nd defendant filed an application under Order 9 Rule 7 and the same was allowed. The status quo ante was, therefore ,restored. But the 2nd defendant did not seek to cross-examine the plaintiff's witnesses and he proceeded to examine his own witnesses. The trial Judge decreed the suit relying upon the evidence of the witnesses of the plaintiff which was not cross-examined. On appeal by defendant, the lower appellate Court took the view that the evidence of the plaintiff's witnesses which was not subject to cross examination could not be used against

the defendant. On further appeal, the High Court took the view that though in a case where Order 9 Rule 7 application is rejected, the defendant could join in the proceedings and continue from that stage, this was a case where the Order 9 Rule 7 application was allowed and the defendant was relegated to the position before he was set ex parte. He had a right to cross-examine the plaintiff's witnesses but that he did not avail of the same though there were six hearings after the application was allowed. He could not be permitted to cross-examine the plaintiff's witnesses at the appellate stage.

(20) A Division Bench of the Punjab High Court in *Sadhu Singh Vs. Shamsheer Singh Josh and Others*, was dealing with an election petition filed against one Mr. Josh. The election petitioner examined 8 witnesses out of 167 on 6.10.62, 14 witnesses on 22.12.62. Mr. Josh having been arrested, counsel could not get instructions but his request for time was rejected. On 23.11.62 more witnesses were examined for the petitioner and were, as per instructions, cross-examined. The matter was adjourned to 22.12.62, 1.2.63 and to 12.2.63, and on 12.2.63, counsel for Mr. Josh withdrew and he was set ex parte. Six witnesses and petitioner were examined and petitioner's case was closed on the issues on which onus lay on petitioner and proceedings were adjourned to 2.3.63 when Mr. Josh's counsel filed application under Order 9 Rule 7. The application was rejected again but permission was granted for addressing arguments. On 9.10.63, Mr. Josh was released and fresh application was filed under Order 9 Rule 7 praying that he should at least be permitted to give his own statement in defense. The application was rejected. The High Court held that the fresh application under Order 9 Rule 7, after release of Mr. Josh, was maintainable and that the Tribunal should exercise discretion in considering "whether or not it would better serve the cause of justice to permit him to appear as his own witness and also to permit him to produce the necessary evidence in rebuttal". The High Court also held that discretion should have been exercised in favor of Mr. Josh. The High Court allowed Mr. Josh to examine himself and 36 witnesses of which a list had been filed earlier.

(21) In *Deo Nand Vs. Achaiber Misir and Others*, it was held that if a defendant wants to proceed from the stage at which he appears and does not require the Court to retrace its steps, he need not invoke Order 9 Rule 7 and such a defendant will have an absolute right without obtaining the Court's permission to take part in the proceedings from the stage they have reached. But if the stage for filing the written statement is over and also issues are already framed and the defendant wants to file a written statement, he must invoke Order 9 Rule 7 by showing good cause.

(22) In *M/s Garvicci vs. Union Bank of India* (1986 (1) CCC 559) *Sultan Singh J*, noticed that written statement was filed, issues were framed on 22.12.93 and plaintiff examined three witnesses on various dates, on 12.10.84 defendant was set ex parte, the Court adjourned the matter for plaintiff's evidence to 3.12.84, 11.12.84, 22.1.85 and to 5.3.85, when Order 9 Rule 7 application was filed. The

trial court dismissed the same on 1.4.85 but allowed defendant to join. In revision, the High Court held that the defendant is entitled to cross examine the plaintiff's witnesses and also adduce evidence on his side.

(23) From the aforesaid rulings, the following principles can be summarised. Where the Court has decided to proceed ex parte under Order 9 Rule 6 Cpc, it means that it has merely decided to go ahead with the case in the absence of the defendant and the situation is not akin to one where an ex parte decree or order is passed against a defendant. The Court merely records in its minutes that it is proceeding forward in the absence of the defendant. If thereafter the Court has taken some steps in the trial, it is open to the defendant to come forward at a later stage and file an application under Order 9 Rule 7 to restore the status quo ante obtaining before he was set ex parte. If good cause is shown for his absence, the Court would allow the application thus relegating him to the same position which obtained before he was set ex parte. But, in case good cause is not shown by the defendant for his earlier absence and the application under Order 9 Rule 7 is rejected, it is still open to the defendant to join and participate in the proceedings at a later stage accepting the events which have taken place in the interregnum, as they stand.

(24) In the case before us the defendant has filed his written statement and the defendant was set ex parte on 6.7.1994 and later on issues were framed on 30.3.1995. The is 394/95 filed on 13.1.95 under Order 9 Rule 7 was allowed on 25.1.95 subject to conditions and stood dismissed later on 20.7.95 for non-compliance with conditions. Even so, it was open to the appellant to apply by filing is 8411/95 on 21.8.95 praying leave to join and participate in the trial. On 30.3.95 issues were framed and the plaintiff was asked to file list of witnesses.

(25) On 25.7.1995, the Court said "post this suit on 1.8.95". On 1.8.95, it said "post on 2.8.95 for orders"; on 2.8.95 it said "At request of counsel for defendants, adjourned to 16th of August,1995"; On 16th the Court again said "At request, adjourned to 23rd August,1995 and on 21.8.95 is 8411/95 was filed as aforesaid. That is was dismissed on 23.8.95 stating that as the appellant had not complied with the conditions laid down by the Division Bench in Fao (OS) 81/95, and that "it is no longer open to the defendant to contest the proceedings".

(26) As pointed out earlier, if is 394/95 under Order 9 Rule 7 was allowed subject to conditions which were modified in Fao (OS) 81/95 and if that is stood dismissed by dismissal of the said Fao on 20.7.95 for non-compliance with the condition of depositing Rs. 2 lakhs, the only result was that the defendant could not be relegated to the anterior stage. That did not mean that he could not seek to join in the proceedings as desired by him on 21.8.95 when he filed the present is 8411/95. By that date, the direction dated 30.3.95 asking the plaintiff to file his list of witnesses alone was in force. Hence there was power in the Court to permit the defendant to participate in the proceedings and it was necessary for the Court to exercise discretion in regard to permitting cross-examination of the plaintiff's witnesses and also in regard to rebuttal evidence to be adduced by the

appellant. The application I.A. 8411/95 could not have been dismissed on the ground that the application under Order 9 Rule 7 earlier filed stood dismissed for want of compliance with the modified conditions imposed in the earlier Fao (OS) 81/95.

(27) The question is whether any condition should be imposed for allowing the appeal. It is clear from the judgment of the Supreme Court in Sangram Singh's case (supra) that the Court could allow the defendant to take part in the proceedings from the stage where they had been reached, subject to such terms and conditions as the Court may think fit to impose.

(28) In the circumstances of the case, we are of the view that the appellant should furnish security in the sum of Rs. 6 lakhs subject to the satisfaction of the Registrar within four weeks from today as a condition for allowing the appellant to participate, cross- examine the plaintiff's witnesses and produce evidence on his side. We allow the appeal and order accordingly. The defendant will proceed with the cross- examination, in case the plaintiff is examining witnesses and the defendant will also conclude evidence on his side within a period of 4 months from the time evidence on his side commences.

(29) List the matter before the Joint Registrar on 20.1.1997.